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# Notes and Comments: Due Process in Automobile Forfeiture Proceedings

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## DUE PROCESS IN AUTOMOBILE FORFEITURE PROCEEDINGS

*Automobile forfeiture statutes authorize confiscation of motor vehicles used to transport or conceal narcotics. The author analyzes the constitutional infirmities of such laws. He evaluates the applicability of procedural due process requirements to the seizure and confiscation of motor vehicles in light of recent cases and examines the trend towards increased protection for innocent owners.*

### I. INTRODUCTION

State seizure of property used in the commission of an alleged crime despite the innocence of its owner of any wrongdoing is a concept alien to the American notion of justice. Yet the federal government<sup>1</sup>, Maryland<sup>2</sup> and most other states<sup>3</sup> have statutes which authorize state or federal officials to seize automobiles and other property involved in the commission of a crime. The purpose of these forfeiture laws is to deter crime by depriving criminals of the instrumentalities by which crimes are committed.<sup>4</sup> Prevalent among these statutes are provisions authorizing law enforcement officers to seize and confiscate automobiles used in drug trafficking.

Formerly forfeiture was authorized despite the owner's lack of involvement in any wrongdoing; but, because of the potential harshness of the forfeiture laws, states now generally provide some form of protection to innocent owners. The nature and extent of this protection are evolving concepts.

This note will analyze and evaluate the protection afforded innocent owners both substantively and procedurally using Maryland's forfeiture law as an example. After a brief review of the history of the forfeiture concept, the provisions of the Maryland statute will be discussed. The emphasis will be on procedural inequities of the forfeiture enforcement in light of recent cases requiring notice and hearing prior to state seizure of property.<sup>5</sup>

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1. 49 U.S.C. § 782 (1970).

2. MD. ANN. CODE art. 27, § 297 (Supp. 1973). The statute is part of the Maryland version of the Uniform Controlled Substances Act. *Id.* §§ 276-302 (Supp. 1973). The Maryland forfeiture provision is similar, but not identical to the confiscation provision of the uniform law. 9 U.L.A. § 505 (1973).

3. For a listing of states that have enacted the Uniform Controlled Substances Act see 9 U.L.A. 145 (1973).

4. Prince George's County v. One (1) 1969 Opel, 267 Md. 491, 497, 298 A.2d 168, 171 (1973); Prince George's County v. Blue Bird Cab Co., 263 Md. 655, 659-60, 284 A.2d 203, 207 (1971).

5. Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

## II. AN OVERVIEW OF THE FORFEITURE CONCEPT

A. *Common Law Deodand*

Since forfeitures are an anachronism of the common law of deodands, an understanding of the deodand concept helps to put into perspective the current application of forfeiture. "A deodand . . . was any personal chattel whatever, animate or inanimate, which becoming the immediate instrument by which the death of a human creature was caused, was forfeited to the king . . . ."<sup>6</sup> The concept was founded on the legal fiction that an inanimate object was capable of doing wrong.<sup>7</sup> Consistent with the fiction, the proceeding was against the object, not against its owner.<sup>8</sup> The innocence or guilt of the owner was immaterial.<sup>9</sup>

At common law chattels were confiscated for superstitious reasons.<sup>10</sup> As late as the thirteenth century the deodand was received by the deceased's kinfolk "not as compensation for the loss they had suffered, but rather as an object upon which their vengeance must be wreaked before the dead man will lie in peace. . . ."<sup>11</sup> Later the concept was modified to require sale of the property and distribution of the proceeds for charitable purposes "for the appeasal of God's wrath."<sup>12</sup> The original purpose later became corrupted by the grant of the property by the king to his favorites.<sup>13</sup> In 1846 deodand was abolished in England by statute.<sup>14</sup> It was never adopted in the United

6. *Parker-Harris Co. v. Tate*, 135 Tenn. 509, 510, 188 S.W. 54, 55 (1916); cf. *King v. United States*, 364 F.2d 235 (5th Cir. 1966). See also *Sollenberger v. Kansas City Pub. Serv. Co.*, 356 Mo. 138, 202 S.W.2d 25 (1947); O. W. HOLMES, *THE COMMON LAW* 7-9, 24-25 (1923) [hereinafter cited as HOLMES]; 2 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 473-74 (2d ed. 1968). [hereinafter cited as POLLOCK & MAITLAND].
7. *United States v. United States Coin & Currency*, 401 U.S. 715, 719 (1971); *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 658, 284 A.2d 203, 204 (1971). The fiction extended to domesticated animals as well as inanimate objects. 2 POLLOCK & MAITLAND at 473.
8. *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931); *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 658, 284 A.2d 203, 204 (1971); 2 POLLOCK & MAITLAND at 473-74. See *United States v. One 1940 Packard Coupe*, 36 F. Supp. 788, 790 (D. Mass. 1941); Note, *Forfeiture of Property Used in Illegal Acts*, 38 NOTRE DAME LAWYER at 727 (1963).
9. "If a man fell from a tree, the tree was deodand. If he drowned in a well, the well was to be filled up. It did not matter that the forfeited instrument belonged to an innocent person." HOLMES at 24-25; 1 W. BLACKSTONE, *COMMENTARIES* 301 (1765) [hereinafter cited as BLACKSTONE].
10. The origins of deodand are illustrated by the Mosaic Code: "When an ox gore a man or woman and they die, he shall be stoned and his flesh shall not be eaten, but the owner of the ox shall be quit." *Exodus* 21:28. See also 1 BLACKSTONE at 301; HOLMES at 24-25; Note, 38 NOTRE DAME LAWYER at 727 (1963).
11. 2 POLLOCK & MAITLAND at 474.
12. *Parker-Harris Co. v. Tate*, 135 Tenn. 509, 510, 188 S.W. 54, 55 (1916); 2 POLLOCK & MAITLAND at 473.
13. *Parker-Harris Co. v. Tate*, 135 Tenn. 509, 510, 188 S.W. 54, 55 (1916); 1 BLACKSTONE at 302.
14. 9 & 10 Vict., c. 62 (1846).

States.<sup>15</sup> Nevertheless, modern forfeiture statutes have been said to be "the direct descendants of this heritage."<sup>16</sup>

### *B. Nature of the Forfeiture Concept*

Forfeiture is the divestiture of specific property without compensation in consequence of some default or act forbidden by law.<sup>17</sup> It is synonymous with confiscation<sup>18</sup> and is generally distinguished from penalty which relates to and is limited to a sum of money.<sup>19</sup> The theory of modern forfeiture statutes is no longer superstitious in nature but rather to help suppress crimes by depriving criminals of property used in their commission.<sup>20</sup> Many cases have held that forfeitures are not favored by the law and thus should be construed as not to work a hardship.<sup>21</sup>

Forfeiture actions, consistent with the deodand concept, are in rem—the thing to be forfeited is the named respondent.<sup>22</sup> The forfeiture hearing is an entirely separate proceeding which has no bearing on any action taken against the owner for allegedly criminal conduct.<sup>23</sup> The innocence of the owner remains immaterial absent some form of statutory protection.<sup>24</sup>

15. *Parker-Harris Co. v. Tate*, 135 Tenn. 509, 510, 188 S.W. 54, 55 (1916); *Sollenberger v. Kansas City Pub. Serv. Co.*, 356 Mo. 138, 202 S.W.2d 25 (1947); 2 POLLOCK & MAITLAND at 473-74. Another type of common law forfeiture that became antiquated was the confiscation of all real and personal property of a convicted felon. However the proceeding was in personam and forfeiture did not attach until the offender was convicted. R. C. DONNELLY, J. GOLDSTEIN & R. D. SCHWARTZ, *CRIMINAL LAW* 495 (1963); 2 BLACKSTONE at 420-21.

16. *United States v. United States Coin & Currency*, 401 U.S. 715, 720 (1971).

17. *Kahn v. Janowski*, 191 Md. 279, 60 A.2d 519 (1947).

18. *Read v. Read*, 9 Va. 160 (1840).

19. *Kahn v. Janowski*, 191 Md. 279, 60 A.2d 519 (1947).

20. The theory justifying forfeiture has been said to be:

[A]ll property is held under the implied obligation that the owner's use of it shall not be injurious to the community, and an owner with knowledge or notice in the premises cannot complain if loss ensues after the law works a forfeiture in the suppression of an evil connected with the use thereof.

*State ex rel. Woodbury County Anti-Saloon League v. McGraw*, 191 Iowa 1090, 1095, 183 N.W. 593, 595 (1921). See also *United States v. One 1949 Lincoln Coupe Auto*, 93 F. Supp. 666 (W.D. Mich. 1950).

21. *Commercial Credit Corp. v. State*, 258 Md. 192, 199, 265 A.2d 748, 752 (1970). See also *United States v. One 1936 Model Ford*, 307 U.S. 219, 226 (1939); *United States v. Currency in the Total Amount of \$2,223.40*, 157 F. Supp. 300, 304 (N.D.N.Y. 1957); *United States v. One 1940 Plymouth Coupe Automobile*, 43 F. Supp. 370, 373 (W.D. Ark. 1942); *United States v. One 1939 Ford Pickup Truck*, 35 F. Supp. 905, 907 (E.D.S.C. 1940).

22. *Gatewood v. State*, 268 Md. 349, 301 A.2d 498 (1973); *State v. Greer*, 263 Md. 692, 284 A.2d 233 (1971).

23. *State v. Greer*, 263 Md. 692, 284 A.2d 233 (1971). Since the procedure is civil, the State's burden of proof is merely a preponderance of the evidence rather than beyond a reasonable doubt. *Prince George's County v. One (1) 1969 Opel*, 267 Md. 491, 495, 298 A.2d 168, 170 (1973); *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 659-60, 284 A.2d 203, 205 (1971).

24. *Lumar Sales, Inc. v. State*, 268 Md. 355, 360, 301 A.2d 495, 497 (1973); *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 659, 284 A.2d 203, 205 (1971).

Forfeiture proceedings are considered to be civil, although some courts have said that the proceeding is quasi-criminal in nature.<sup>25</sup> The proceedings would clearly be labeled criminal if an objective guide to classification were used—whether their purpose is remedial (civil) or punitive (criminal).<sup>26</sup> For if the statute were truly remedial, the owner could then show that the value of the property forfeited exceeds reasonable compensation to society for the wrong done.<sup>27</sup> However, at least in Maryland, forfeiture statutes are still considered civil.<sup>28</sup>

### C. Constitutional Inviolability

Several grounds have been unsuccessfully urged as requiring invalidity of forfeiture statutes. The most frequently asserted constitutional objection has been that the taking of property without compensation from an innocent owner, often for the wrong of another, violates the fifth or fourteenth amendments.<sup>29</sup> Until recently, however, it was considered well settled that forfeiture is a valid exercise of the police power.<sup>30</sup> Although some recent cases,<sup>31</sup> which will be briefly discussed in a later section, have questioned this principle, it remains viable.

Another constitutional objection to forfeiture statutes has been that confiscation of property impairs the validity of contracts. The cases in which this objection has been raised have dismissed it quite simply by asserting the a priori principle that a contractual obligation is not impaired by a statute that is in effect prior to the date of the contract.<sup>32</sup> A third constitutional claim has been that of double jeopardy. Multiple proceedings in which first the person and then his property are acted against make double jeopardy an appealing argument. Nevertheless, it has been repeatedly held that since the forfeiture proceeding is

25. *In Re Food Conservation Act*, 254 F. 893, 904 (N.D.N.Y. 1918): "[T]he proceeding, in its nature criminal, to take the property . . . is a proceeding not against the property alone, but against the offender . . ."

26. *State v. One 1960 Mercury Station Wagon*, 5 Conn. Cir. Ct. 1, 240 A.2d 99 (1968); *Commercial Credit Corp. v. State*, 258 Md. 192, 265 A.2d 748 (1970); *Commonwealth v. One 1962 Chrysler Hardtop Sedan*, 201 Pa. Super. 478, 193 A.2d 636 (1963).

27. Note, *Search and Seizure in Forfeiture Proceedings for Liquor Law Violations*: *Commonwealth v. One 1958 Plymouth Sedan*, 69 Dick. L. Rev. 284 (1965).

28. *State v. Greer*, 263 Md. 692, 284 A.2d 233 (1971); see cases cited note 23 *supra*.

29. The state, in the exercise of its constitutional power and in aid of the administration of the criminal law, has long imposed responsibilities on owners and other persons having interests in particular personal property "by ascribing to the property a certain personality, a power of complicity and guilt in the wrong . . ." J. W. Goldsmith, Jr., *Grant Co. v. United States*, 254 U.S. 505, 510 (1921). See also *Van Oster v. Kansas*, 272 U.S. 465 (1926). The rule that property may be forfeited irrespective of the innocence of the owner has often been criticized as being too harsh, especially in regard to innocent owners and lienholders. See Black, *Some Prohibition Forfeiture Cases—The Doctrine of Vicarious Liability*, 78 U. PA. L. REV. 518 (1930); MacDonald, *Automobile Forfeitures and the Eighteenth Amendment*, 10 TEX. L. REV. 140 (1932); Note, 38 NOTRE DAME LAWYER 727 (1963).

30. See *United States v. United States Coin & Currency*, 401 U.S. 715, 722 (1971).

31. See note 147 *infra*.

32. *Oshkosh Waterworks Co. v. Oshkosh*, 187 U.S. 437, 446 (1903); *United States v. One 1962 Ford Thunderbird*, 232 F. Supp. 1019 (N.D. Ill. 1964).

an entirely different case that has no relation to the action against the offender, double jeopardy is inapplicable.<sup>33</sup>

A fourth objection, not constitutional in nature, has been that the acquittal of the owner in the prior criminal proceeding is *res judicata* of the forfeiture proceeding. The rejection of this claim, like that of the double jeopardy argument, has been founded on the separate nature of the criminal and forfeiture proceedings. Since the quantum of proof in the civil forfeiture proceeding is a mere preponderance of the evidence, while proof beyond a reasonable doubt is required in a criminal case, an acquittal in the criminal proceeding does not necessarily mean that the state could not meet its burden of proof in the subsequent forfeiture proceeding.<sup>34</sup>

#### *D. The Need to Protect and Define Innocent Owners*

The harsh results possible under the forfeiture laws have resulted in the recent recognition of the need to protect innocent owners. Surely no one would deny that a statute which authorizes the state to seize and forfeit property despite an owner's lack of involvement in criminal activity works a harsh result. Confiscation of automobiles may deprive their owners of their means of earning a livelihood, or seriously impair the business activities of lienholders or rental car agencies. This result is unnecessary as well as harsh when forfeiture does not serve its avowed purpose of curtailing and discouraging drug traffic. The federal forfeiture statutes are said to have the following purpose:

[I]t has been the experience of our enforcement officers that the best way to strike at commercialized crime is through the pocketbooks of the criminals who engage in it. By decreasing

33. *United States v. Fields*, 425 F.2d 883 (3d Cir. 1970). *See also* Annot., 27 A.L.R.2d 1137 (1953). In *United States v. One 1951 Cadillac Coupe de Ville*, 108 F. Supp. 286 (W.D. Pa. 1952), the acquittal of the owner from a criminal charge of unlawful possession of narcotics did not bar forfeiture proceedings against the car used to transport narcotics. *See also* *United States v. One 1953 Oldsmobile Sedan*, 132 F. Supp. 14, 19 (W.D. Ark. 1955). Neither has it been held double jeopardy that the owner must stand trial in a criminal prosecution after losing his property in a forfeiture action. *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931); *United States v. One Machine for Corking Bottles*, 267 F. 501 (W.D. Wash. 1920); *United States v. Manufacturing Apparatus*, 240 F. 235 (D. Colo. 1916); *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 284 A.2d 203 (1971); *State v. Greer*, 263 Md. 692, 284 A.2d 233 (1971). Nevertheless at least one court has held that a forfeiture proceeding brought subsequent to a conviction which arose out of the same transaction constitutes double jeopardy. *United States v. One Distillery*, 43 F. 846 (S.D. Cal. 1890); *cf. McKeehan v. United States*, 438 F.2d 739, 747 (6th Cir. 1971) (concurring opinion).
34. *United States v. One Ford Coupe Automobile*, 272 U.S. 321 (1926); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827); *United States v. One 1937 Model Ford Coach*, 57 F. Supp. 977 (W.D.S.C. 1944). However, one case has held that a prior acquittal of the owner of the property subject to forfeiture would bar the subsequent proceeding. *Coffey v. United States*, 116 U.S. 436 (1886). *Coffey* was cited with approval in *United States v. One 1956 Ford Fairlane Tudor Sedan*, 272 F.2d 704 (10th Cir. 1959). *See also* *McKeehan v. United States*, 438 F.2d 739 (6th Cir. 1971). In Maryland the argument has been rejected. *State v. Greer*, 263 Md. 692, 284 A.2d 233 (1971); *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 284 A.2d 203 (1971).

the profits which make illicit activity of this type possible, crime itself can also be decreased. Vessels, vehicles, and aircraft may be termed "the operating tools" of dope peddlers, counterfeiters, and gangsters. They represent tangible major capital investments to criminals whose liquid assets, if any, are frequently not accessible to the government.<sup>3 5</sup>

The definition of innocent owner should be related to the purpose of forfeiture statutes. "When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise."<sup>3 6</sup> Consequently, as a general proposition, the definition of innocent owner should encompass those who are not significantly involved in such an enterprise.<sup>3 7</sup> In spite of this basic proposition, there has been a lack of harmony in delimiting who should be considered an innocent owner. The protection to be afforded depends on the terms of the statute. For example, the New York statute has been construed as not affording protection to an owner acquitted of a narcotics possession charge.<sup>3 8</sup> On the other hand, Indiana makes the outcome of its forfeiture proceedings dependent upon a prior conviction for narcotics transportation.<sup>3 9</sup> Other examples include: the North Carolina statute has been interpreted as intended to protect any owner who is not the person arrested as being "in charge of the vehicle at the time of the arrest;"<sup>4 0</sup> the Illinois statute exempts innocent owners if they are "without wilful negligence" or "intention" to violate the law;<sup>4 1</sup> Connecticut has adhered rigidly to the common law concept of deodand and does not protect innocent owners.<sup>4 2</sup>

Despite the inconsistency in defining innocent owner, there has been a definite trend toward expanding the protection afforded them. This trend has been exemplified by changes in the California law. Prior to 1959, the California statute<sup>4 3</sup> offered the following defenses to owners in a proceeding to forfeit their vehicles: that the vehicle was not used to transport narcotics and that narcotics were not unlawfully possessed by the vehicle occupant, e.g., prescription drugs.<sup>4 4</sup> By judicial decision two additional defenses were added: that the owner did not consent to

35. H.R. REP. NO. 1054, 76th Cong., 1st Sess. 2 (1939). *See also* H.R. REP. NO. 2751, 81st Cong., 2d Sess. (1950).

36. *United States v. United States Coin & Currency*, 401 U.S. 715, 721 (1971).

37. *Id.* at 722.

38. *Sachemaro v. Rosetti*, 6 Misc. 2d 23, 161 N.Y.S.2d 454 (1957).

39. IND. STAT. ANN. tit. 10-3556(d) (Supp. 1973).

40. *State v. O'Hora*, 12 N.C. App. 250, 252-53, 182 S.E.2d 823, 825 (1971). *See also* *State v. Godette*, 188 N.C. 497, 125 S.E. 24 (1924); *cf.* *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 284 A.2d 203 (1971).

41. *One 1957 Chevrolet v. Division of Narcotic Control*, 27 Ill. 2d 429, 189 N.E.2d 347 (1963); *Boling v. Division of Narcotic Control*, 24 Ill. 2d 305, 181 N.E.2d 147 (1962); ILL. ANN. STAT. ch.38, § 36-2 (Supp. 1973).

42. *State v. One 1960 Mercury Station Wagon*, 5 Conn. Cir. Ct. 1, 240 A.2d 99 (1968); CONN. GEN. STAT. ANN. § 54-33(g) (Supp. 1973).

43. Law of May 4, 1963, ch. 253 § 13, [1933] Cal. Stat. 788.

44. *People v. One 1962 Chevrolet Bel Air*, 248 Cal. App. 2d 725, 56 Cal. Rptr. 878 (1967).

the taking of the vehicle<sup>4 5</sup> and that the lienholder had made a reasonable investigation of the purchaser's character.<sup>4 6</sup> The owner's lack of knowledge of the illegal use was not a defense.<sup>4 7</sup> In 1959 California amended its statute to require actual knowledge of a purchaser's involvement with drug trafficking instead of a duty imposed to make a reasonable investigation.<sup>4 8</sup> But a lessor such as Hertz Rent-A-Car did not fall under the provisions that protect lienholders because a lessor was simply an owner who gave consent to another for the use of the vehicle.<sup>4 9</sup> Finally, in 1967 the California legislature repealed its forfeiture statute.<sup>5 0</sup>

A further illustration of the trend toward providing protection to innocent owners is the Uniform Controlled Substances Act (UCSA), a recent addition to the regulation of narcotics, which has been adopted by at least forty states within the last few years.<sup>5 1</sup> Under its forfeiture provision, conveyances used to transport illegal substances are forfeited. As in the prior uniform law (the Uniform Narcotics Act<sup>5 2</sup>), common carriers and vehicles unlawfully in the possession of another person are expressly exempted from confiscation;<sup>5 3</sup> however, the UCSA does protect the owner from seizure and forfeiture due to offenses committed in his automobile "without his knowledge or consent."<sup>5 4</sup>

The most recent change in Maryland's forfeiture statute is consistent with the trend toward liberalizing the definition of innocent owner. The Maryland statute will be discussed in the next section.

### III. PROTECTING INNOCENT OWNERS IN MARYLAND

Maryland, like most other states, has abandoned the historical deodand concept and now provides specific statutory protection for innocent owners. The nature and extent of that protection will be discussed in this section.

#### *A. Summary of the Maryland Statute*

Although a more detailed analysis of the Maryland statute follows, a

45. *People v. One 1957 Ford Two Door*, 180 Cal. App. 2d 454, 4 Cal. Rptr. 79 (1960).

46. *People v. One 1959 MG Sport Coupe*, 182 Cal. App. 2d 448, 6 Cal. Rptr. 112 (1960).

47. *People v. One 1964 Chevrolet Corvette Convertible*, 274 Cal. App. 2d 720, 79 Cal. Rptr. 447 (1969); *People v. Sabino*, 215 Cal. App. 2d 149, 30 Cal. Rptr. 110 (1963).

48. Law of Sept. 18, 1959, ch. 2085, § 7, [1959] Cal. Stat. 4817; *People v. One 1964 Chevrolet Corvette Convertible*, 274 Cal. App. 2d 720, 79 Cal. Rptr. 447 (1969).

49. *People v. One 1959 Buick 2-Door Coupe*, 187 Cal. App. 2d 684, 10 Cal. Rptr. 79 (1960).

50. Law of June 7, 1967, ch. 280, § 1[1967], Cal. Stat. 1437. Section 3 of the Act indicated two reasons for repeal—abolition of the motor vehicle forfeiture provisions was expected to save the state \$600,000 annually, and the provisions were said to have no deterrent effect on illegal narcotics activity.

51. For a listing of states that have adopted the Uniform Controlled Substances Act see 9 U.L.A. 145 (1973).

52. Uniform Controlled Substances Act, 9B U.L.A. 409 (1966).

53. Uniform Controlled Substances Act, 9 U.L.A. § 505(a)(4)(i)-(ii) (1973).

54. *Id.* § 505(a)(4)(ii).



brief overview of the forfeiture procedure will be helpful in putting the statutory provisions in perspective. Maryland's current forfeiture statute,<sup>55</sup> enacted in 1972, authorizes forfeiture of motor vehicles used to transport controlled dangerous substances.<sup>56</sup> In determining whether a motor vehicle should be seized and its forfeiture sought, law enforcement officers are directed to follow certain standards.<sup>57</sup> Subject to these guidelines, an officer has broad discretion to seize motor vehicles. Vehicles subject to forfeiture are to be seized upon process, but seizure without process is authorized in four instances: when seizure is incident to arrest; when the property has been ordered forfeited in a judicial proceeding; when there is probable cause to believe that the vehicle endangers health or safety; or when there is probable cause to believe that the property has been used in violation of the statute.<sup>58</sup> These exceptions, however, appear so broad that seizure would be authorized in most circumstances without process.<sup>59</sup> Once the vehicle has been seized it is deemed to remain in the custody of the seizing officer pending further proceedings.<sup>60</sup>

Forfeiture of a seized vehicle is then recommended to the local state's attorney in writing by the chief officer of the seizing agency only after that officer has personally reviewed the circumstances of the seizure and has determined that forfeiture is warranted.<sup>61</sup> His discretion in so determining is to be exercised in accordance with the previously discussed guidelines.<sup>62</sup>

If forfeiture is recommended, the state's attorney must notify the registered owner and any lienholders that a seizure has taken place and that a petition for forfeiture will be filed.<sup>63</sup> Two options follow: after an independent review of the circumstances of the seizure, he may return the vehicle, upon request of the owner if he determines that the standards for forfeiture were not met; or<sup>64</sup> he may petition the circuit

55. MD. ANN. CODE art. 27, § 297 (Supp. 1973).

56. *Id.* § 297(a)(4) (Supp. 1973).

57. *Id.* § 297(f) (Supp. 1973).

58. *Id.* § 297(b) (Supp. 1973).

59. *Id.* The section further provides that in the event seizure is based on one of the probable cause exceptions, forfeiture proceedings are to be instituted promptly. In *Geppi v. State*, 270 Md. 239, 310 A.2d 768 (1973), the court held that forfeiture proceedings had not been instituted promptly when the forfeiture petition had been filed more than eight months after the criminal charges lodged against the owner had been setted and the state offered no explanation for the delay. The court ordered the property returned to its owner. On the other hand, a forfeiture proceeding initiated after a delay of four months was instituted promptly when the state offered a satisfactory explanation for the delay. *Gatewood v. State*, 268 Md. 349, 301 A.2d 498 (1973). See also *One 1972 Fiat v. State*, No. 197 (Md. Ct. App., filed Jan. 25, 1974). The current version of § 297, which was not in effect at the time of the filing of forfeiture petitions in *Geppi* and *Gatewood*, requires that the forfeiture hearing be held not more than 30 days after conviction of the accused. This section potentially conflicts with the provision requiring prompt institution of forfeiture proceedings since the criminal trial may not occur for a year or more.

60. *Id.* § 297(c) (Supp. 1973).

61. *Id.* § 297(f)(3) (Supp. 1973).

62. *Id.*

63. *Id.* § 297(g)-(h) (Supp. 1973).

64. *Id.* § 297(i) (Supp. 1973).

court of proper jurisdiction to order forfeiture pursuant to a hearing.<sup>65</sup>

Once the forfeiture proceeding is begun, the court obtains custody of the vehicle.<sup>66</sup> The hearing is scheduled to follow the criminal trial of the violator in the usual case.<sup>67</sup> If the accused is found guilty, the court retains custody of the vehicle until the forfeiture hearing begins (no later than 30 days after conviction).<sup>68</sup> The owner may obtain possession of the vehicle before the forfeiture proceeding by posting a bond in an amount equal to the appraised value of the vehicle plus anticipated court costs.<sup>69</sup>

The court may order forfeiture if it determines that the vehicle was illegally used and that the owner knew or should have known that it was to be used illegally.<sup>70</sup> The owner is permitted to answer the forfeiture petition<sup>71</sup> and he may obtain release of the vehicle if he establishes either that the vehicle was not unlawfully used or that he neither knew nor should have known that the vehicle was to be so used.<sup>72</sup> If the court enters a forfeiture order, the car is publicly auctioned and the proceeds of the sale applied in the following order: to the expenses of forfeiture and sale, to the balance due on any lien and then to the state.<sup>73</sup>

#### *B. The Protection Afforded Innocent Owners*

Although the Maryland statute does not include an express definition of the term "innocent owner," protection is afforded owners in three different ways. First, vehicles of certain owners are expressly exempted from forfeiture.<sup>74</sup> Second, if the owner can show at the forfeiture

65. *Id.* § 297(j) (Supp. 1973).

66. *Id.* § 297(n) (Supp. 1973).

67. *Id.*

68. *Id.*

69. *Id.* § 297(n) (Supp. 1973).

70. *Id.* § 297(q) (Supp. 1973) (emphasis added) provides:

If after a full hearing the court decides that the vehicle was used in violation of this subtitle *or* that the owner knew or should have known that the motor vehicle was being, or was to be so used, the court shall order that the motor vehicle be forfeited to the State.

Although the legislature used the word "or," it appears that they meant "and." The preceding section authorizes the court to order release of the vehicle if the owner shows that the vehicle was not unlawfully used *or* that he neither knew nor should have known of the illegal use. *Id.* § 297(p) (Supp. 1973). The opportunity to show lack of knowledge would be meaningless if the court could order forfeiture solely on a finding that the vehicle had been used unlawfully.

71. *Id.* § 297(k)-(l) (Supp. 1973).

72. *Id.* § 297(p) (Supp. 1973).

73. *Id.* § 297(r)-(u) (Supp. 1973).

74. *Id.* § 297(a) (Supp. 1973) provides:

The following shall be subject to forfeiture and no property right shall exist in them:

(4) All conveyances including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in (1) or (2), except that,

(i) No conveyance used by any person as a common carrier or vehicle for hire in

proceeding that he "neither knew nor should have known" that the vehicle would be used in violation of state drug laws, he is entitled to recover it.<sup>75</sup> Third, the statute provides guidelines to direct the discretion of law enforcement officers in seizing vehicles and petitioning for their forfeiture.<sup>76</sup>

### 1. Exemptions

Policy grounds are the apparent reason for the exemption of some vehicles from forfeiture. The first of the two exemptions protects owners of common carriers and vehicles for hire.<sup>77</sup> The apparent purpose of this exemption is to protect those who hold their vehicles out for public use, for example, buses, airplanes, cabs and rental vehicles. These owners obviously are not able practicably to prevent passengers from carrying controlled substances onto their vehicles and thus need such protection. The exemption is subject to two restrictions. First, the vehicle must be used "in the transaction of business as a common carrier or vehicle for hire." It is not clear whether this language requires that the vehicle be used merely occasionally or primarily as a common carrier or vehicle for hire, or whether it must have been so used at the time of the commission of the alleged offense. No reported Maryland case has yet construed this language. Second, the exemption does not apply if the "owner or other person in charge" of the vehicle "was a consenting party or privy to a violation of" the statute. This language has been applied in *Prince George's County v. Blue Bird Cab Co.*,<sup>78</sup> where a cab company leased a cab to its driver. The driver was arrested for allegedly selling heroin from the cab and the state's attorney petitioned for forfeiture. The owner contended that the driver was not an "other person in charge."<sup>79</sup> Because he was behind in his rental payments the driver's use of the cab was said to be unauthorized. The testimony, however, showed that at the time of the driver's arrest the owner had not considered the lease void and had not wanted its cab back. The court considered this evidence sufficient to reject the cab company's claim that the driver was not in charge of the vehicle.

The second exemption protects owners who can establish that the act complained of was committed by another while the owner's vehicle

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the transaction of business as a common carrier or vehicle for hire shall be seized or forfeited under this subheading unless it appears that the owner or other person in charge of the conveyance was a consenting party or privy to a violation of this subheading; and

(ii) No conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any state . . . .

75. *Id.* § 297(p) (Supp. 1973).

76. *Id.* § 297(f) (Supp. 1973).

77. *Id.* § 297(a)(4)(i) (Supp. 1973).

78. *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 284 A.2d 203 (1971).

79. MD. ANN. CODE art. 27, § 297(a)(4)(i) (Supp. 1973).

was "unlawfully in the possession of a person other than the owner in violation of" state or federal criminal laws.<sup>80</sup> This exemption protects those whose cars are stolen and then used to transport drugs. It is restricted by the requirement that the possession be in violation of the criminal law. This restriction is illustrated by two Maryland cases. In one case<sup>81</sup> the vendor under a conditional sales contract resisted forfeiture of the vehicle in which it had retained a security interest. The automobile was said by the vendor to be unlawfully in possession of the vendee because the vendee had used an alias in purchasing it.<sup>82</sup> The vendor claimed the alias was used to prevent the vendor from discovering the purchaser's prior narcotics conviction, and, therefore, that the buyer obtained the vehicle by a false pretence or by larceny by trick. Although the court agreed that the conditional seller fell within the definition of owner, there was insufficient evidence in the record to determine whether the circumstances were sufficient to establish a criminal possession of the vehicle; consequently, the case was remanded for further proceedings. In the *Blue Bird Cab Co.* case the owner of the cab also argued that the cab was unlawfully in possession of the driver.<sup>83</sup> The driver's possession of heroin was claimed to be in violation of the lease and, therefore, unlawful. The court held, however, that possession in violation of a lease provision, even though the lease violation also constituted a crime, did not of itself violate the Maryland criminal law. The court pointed out that the breach of a private agreement did not create a criminal offense.

## 2. Lack of Knowledge

Prior to repeal and reenactment of the statute in 1972, the exemptions from forfeiture were the only protection expressly afforded an innocent owner. In 1972 the legislature added the new provisions which allow an innocent owner to answer the forfeiture petition.<sup>84</sup> If the owner can establish that the vehicle was not used in violation of the statute or that he "neither knew nor should have known that the motor vehicle was being, or was to be" used in violation of the narcotics laws, then the court may grant return of the vehicle.<sup>85</sup> This provision is a broad grant of protection and appears to engulf the statutory exemptions previously discussed. It effectively ensures that lienholders and rental car companies can recover vehicles in which they have an interest. No reported decisions have construed or applied this section, but it is apparent that it would have protected the owners in the cases previously discussed<sup>86</sup> had it been part of the statute at that time.

80. *Id.* § 297(a)(4)(ii) (Supp. 1973).

81. *Lumar Sales, Inc., v. State*, 268 Md. 355, 301 A.2d 495 (1973).

82. *Id.* at 360, 301 A.2d at 497.

83. *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 284 A.2d 203 (1971).

84. MD. ANN. CODE art. 27, § 297(k)-(l) (Supp. 1973).

85. *Id.* § 297(p) (Supp. 1973).

86. *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 284 A.2d 203 (1971); *Commercial Credit Corp. v. State*, 258 Md. 192, 265 A.2d 748 (1970).

Although the statute does not expressly so provide, it has been held that in a forfeiture proceeding the state has the burden of proving that the seized vehicle was used in violation of the statute.<sup>87</sup> Since the proceeding is civil rather than criminal, the state's burden is simply proof by a preponderance of the evidence rather than beyond a reasonable doubt. An owner seeking recovery of his vehicle is required by the state to prove by a preponderance of the evidence that he neither knew nor should have known that it would be.<sup>88</sup> It has been argued that placing the burden of proving that he is entitled to recover his vehicle on an innocent owner violates due process. At least one court has rejected this argument.<sup>89</sup> The court said that exceptions or exemptions from forfeiture statutes are not constitutionally mandated, but are matters of legislative grace. The implication is that the legislature may impose such conditions as it deems desirable on recovery of their vehicles by innocent owners, including the requirement that the owner affirmatively prove his innocence.

Another subsection provides that once the forfeiture petition is filed the court "shall retain custody of the motor vehicle pending prosecution of the person accused and in case such person be found guilty, the motor vehicle shall remain in the custody of the court until the hearing on the forfeiture is held."<sup>90</sup> The statute is silent as to what happens to the vehicle if the accused is found not guilty; however, the language used implies that the vehicle will be released to its owner if the accused is not convicted. This implication, however, is inconsistent with the statutory provision on release by the court of seized vehicles at forfeiture hearings. The court is authorized to order release only if the owner proves that it was not used unlawfully or that he neither knew nor should have known that it was or would be so used.<sup>91</sup> Acquittal of the accused does not establish either proposition for two reasons: first, the state's burden of proof in the criminal proceeding against the accused is far more stringent than its burden in the civil action against the property; further, the burden of establishing that the vehicle should be released is on the owner, not the state.<sup>92</sup>

87. See *Fell v. Armour*, 355 F. Supp. 1319, 1330 (M.D. Tenn. 1972).

88. See MD. ANN. CODE art. 27, § 297(p) (Supp. 1973).

89. *Fell v. Armour*, 355 F. Supp. 1319, 1331 (M.D. Tenn. 1972).

90. MD. ANN. CODE art. 27, § 297 (n) (Supp. 1973).

91. *Id.* § 297(p) (Supp. 1973).

92. The forfeiture statute has been amended to protect some owners whose cars were ordered forfeited under the prior statute. S.B. 271, Md. Gen. Ass., 1974 Sess., signed March 28, 1974 provides in part:

[I]f prior to July 1, 1972 and under section 297 of Article 27 as it then existed, a court ordered a motor vehicle forfeited at a hearing prior to the owner's trial, and the owner was subsequently acquitted, the court ordering the forfeiture, upon request by the owner, shall order the motor vehicle returned to him.

The bill does not indicate what remedy, if any, the court may apply if the vehicle has already been sold by the state. The following article appeared in the *Baltimore Morning Sun*, March 28, 1974, at A-16, col. 1:

Governor Mandel today is scheduled to sign into law emergency legislation that will return a yellow Opel sports car, once used "officially" by the Howard county state's attorney, to its original owner, Beverly Dobbins Keathley.

### 3. Statutory Guidelines

In order for an innocent owner to take advantage of the two protections discussed previously—the two exemptions from seizure and the knew or should have known standard—he must await a forfeiture hearing. That hearing, the statute says, is to be scheduled after the trial of the person accused.<sup>93</sup> Thus it may not occur until a year or even more after the seizure of the owner's vehicle. Consequently, some form of protection was needed to preclude seizure of the vehicles of innocent owners, or at least to provide for the prompt return of such vehicles. To provide this protection the legislature has adopted standards to guide officials in determining whether a vehicle should be seized, and, if it is seized, whether it should be returned.<sup>94</sup>

Forfeiture statutes generally give state officials broad discretion to proceed with seizure and forfeiture of a vehicle. The initial decision is that of the seizing officer. If the officer has determined that the vehicle has been used unlawfully, he must then decide whether it should be seized. Following seizure, the state's attorney or other prosecutor must decide whether to remit the vehicle to its owner or to petition for forfeiture.

Prior to the 1972 reenactment, the Maryland statute contained no guidelines for the police or state's attorney to follow in exercising their discretion. The statute was challenged in *Prince George's County v. One (1) 1969 Opel*<sup>95</sup> on the ground that the failure of the legislature to provide such guidelines was an unconstitutional delegation of legislative authority. The situation involved a father who permitted his daughter to use his car. The daughter allegedly sold methadone from it. A county detective reported the alleged sale to the state's attorney, who petitioned for its forfeiture. The chancellor agreed with the owner's challenge, held the statute under which the forfeiture was authorized unconstitutional and ordered the vehicle remitted to the father. The chancellor's order was reversed by the Court of Appeals on the ground that the wide discretion vested in the state's attorney was necessary to facilitate administration of the statute.<sup>96</sup> The court noted that the exercise of discretion by the state's attorney in petitioning for forfeiture was not subject to judicial review.<sup>97</sup>

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The governor at an earlier press conference had called the civil forfeiture of Mrs. Keathley's 1970 auto to Richard J. Kinlein, the Howard county state's attorney, "really a travesty of justice." Mr. Kinlein had operated the sports car, seized in a 1972 marijuana possession case, for about a year, but returned it to the county government saying publicity about the case was becoming a "hassle."

The sports car currently is parked in the Howard County Police Department lot, "awaiting official notification to dispose of it," a police spokesman said yesterday.

Mrs. Keathley . . . was acquitted in the drug case. . . .

93. MD. ANN. CODE art. 27, § 297(n) (Supp. 1973).

94. *Id.* § 297(f) (Supp. 1973).

95. 267 Md. 491, 298 A.2d 168 (1973).

96. *Id.* at 499-500, 298 A.2d at 172.

97. *Id.* at 498-99, 298 A.2d at 171-72.

In the interim between the chancellor's decision and the reversal by the Court of Appeals, the legislature reenacted the statute in what may have been a legislative response to the trial court's decision. As previously discussed the new statute directs law enforcement officers to follow certain guidelines in determining whether a vehicle should be seized and forfeited.<sup>98</sup> The guidelines are narrower than the "neither knew nor should have known" standard. Under the guidelines a motor vehicle is not to be seized and forfeited when:

The motor vehicle is being used by a member of the family other than the registered owner and controlled dangerous substances or paraphernalia are located therein in a quantity insufficient to suggest a sale is contemplated, and where no sale was made or attempted, and the registered owner neither knew nor should have known that such material was in the motor vehicle . . . .<sup>99</sup>

98. MD. ANN. CODE art. 27, § 297(f) (Supp. 1973) provides:

In exercising the authority to seize motor vehicles pursuant to this section the following standards shall be utilized:

(1) A motor vehicle used in violation of this section shall be seized and forfeiture recommended to the State's attorney when:

(i) Controlled dangerous substances in any quantity are sold or attempted to be sold in violation of this subtitle;

(ii) Although the violator has not sold or attempted to sell controlled dangerous substances in violation of this subtitle, an amount of such substances or paraphernalia is located which would reasonably indicate that sale is contemplated by the violator.

(iii) The total circumstances of the case dictate that seizure and forfeiture is justified; these circumstances would include such factors as the following:

(a) The possession of controlled dangerous substances;

(b) An extensive criminal record of the violator;

(c) A previous conviction of the violator for a controlled dangerous substances violation;

(d) Corroborated information is developed indicating that the violator is or was recently a seller, or frequently associates with individuals known to be distributors of illegal controlled dangerous substances or paraphernalia;

(e) Circumstances of the arrest;

(f) The manner in which the vehicle was being used.

(2) A motor vehicle used in violation of this subtitle shall not be seized and forfeiture shall not be recommended to the State's attorney when:

(i) The motor vehicle is being used by a member of the family other than the registered owner and controlled dangerous substances or paraphernalia are located therein in a quantity insufficient to suggest a sale is contemplated, and where no sale was made or attempted, and the registered owner neither knew nor should have known that such material was in the motor vehicle;

(ii) An innocent registered owner lends his motor vehicle to another and the latter or someone invited into the motor vehicle by such person causes controlled dangerous substances or paraphernalia to be brought into the vehicle without the knowledge of the owner.

(iii) The motor vehicle falls within the provisions of 297 (a) (4) (a) or (b).

99. *Id.* § 297(f)(2) (Supp. 1973). Prior to the enactment of the current statute the State's Attorney of Prince George's County opened:

The owner must be totally innocent of any involvement whatsoever in the trafficking (sic) in drugs, which means that we'll take a vehicle if the father has loaned his vehicle to his son and his son is involved in the trafficking (sic) of drugs. A stranger to the activities would be the only people that we would not proceed against [e.g., hitchhikers].

It has been argued that these requirements are conjunctive and that all three must be met or seizure and forfeiture will be proper.<sup>100</sup> When the section is read alone, that interpretation appears appropriate; but the argument is plainly inconsistent with the section authorizing the court to order release of a vehicle when its owner establishes that he had no knowledge of the proposed unlawful use. Forfeiture at least should be governed by the more specific provisions on ordering release. The question then is when is seizure not appropriate. The apparent legislative purpose in adopting the standards was to protect innocent owners from the initial seizure of their vehicles. This purpose would be better served by construing the section in the disjunctive to preclude seizure when the owner had no knowledge, even though a sale was made or attempted or a large quantity of drugs found.

Another problem is that the guidelines do not protect lienholders. Lienholders are protected from forfeiture by the "neither knew nor should have known" standard, and the initial seizure does not harm a lienholder who does not have possession of the vehicle. But the standards do not provide for release of the vehicle to the lienholder after seizure.<sup>101</sup> Since the vehicle will be held in custody until after the trial of the person accused, it may depreciate in value, substantially impairing the lienholder's collateral, before its release at the forfeiture hearing.

Nevertheless, the standards do offer some protection to innocent owners. The extent of this protection will depend on how closely they are followed. Of particular importance, therefore, is the question of whether the standards are mandatory or merely directory. Although the statute provides that "a motor vehicle used in violation of this subtitle *shall* not be seized and forfeiture *shall* not be recommended to the state's attorney when . . .",<sup>102</sup> the use of the term "shall" is not controlling in determining whether the statute is mandatory or directory. The intention of the legislature is to be determined by considering both the subject matter and the purposes sought to be achieved.<sup>103</sup> In this regard it is significant that the statute is silent as to the court's

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Joint Record at 32, *Prince George's County v. One (1) 1969 Opel*, 267 Md. 491, 298 A.2d 168 (1973). Subsequent to the enactment of the current statute the State's Attorney of Baltimore City averred through his designated assistant that he would be inclined to forfeit vehicles only of those owners that should have known of the illegal transportation; consequently, the vehicle of a father who lends it to his son without prior knowledge of the unlawful use would not be confiscated. But an owner who has a history of involvement in drug distribution would not be as generously treated. The Baltimore City State's Attorneys' Office has a general understanding with lending institutions that cars in which they hold security interests will be released to them on condition that they do not return the car to the purchaser.

100. Brief for Appellee at 10, *One 1972 Fiat v. State*, No. 197 (Md. Ct. App., filed Jan. 25, 1974).

101. *But see* note 99 *supra*.

102. MD. ANN. CODE art. 27, § 297(f)(2) (Supp. 1973).

103. *Hitchens v. City of Cumberland*, 215 Md. 315, 323, 138 A.2d 359, 362-63 (1958). *See also Barnes v. State ex rel. Pinkney*, 236 Md. 564, 574, 204 A.2d 787, 792 (1964).



power to review action taken pursuant to the guidelines. Further it has previously been held that the state's attorney has unreviewable discretion to petition for forfeiture.<sup>104</sup> In the absence of an express grant of power to the courts to review there appears to be no effective way of enforcing the guidelines, and they should be considered to be merely directory.<sup>105</sup> Since the standards are merely directory, they do not effectively limit the broad discretion granted to law enforcement officials to seize and to seek forfeiture of motor vehicles.

Much potential for abuse exists in the exercise of broad grants of discretion. In the words of Mr. Justice Douglas:

Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered . . . . Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.<sup>106</sup>

The danger with respect to the forfeiture statute is that discretion will

104. *Prince George's County v. One (1) 1969 Opel*, 267 Md. 491, 298 A.2d 168 (1973); *State v. One 1967 Ford Mustang*, 266 Md. 275, 292 A.2d 64 (1972). See also *United States v. Addison*, 260 F.2d 908 (5th Cir. 1958); *United States v. Andrade*, 181 F.2d 42 (9th Cir. 1950); *United States v. Hechinger*, 163 F.2d 472 (2d Cir. 1947); *People v. One 1953 Mercury Four Door Sedan*, 174 Cal. 2d 435, 344 P.2d 637 (1959); *Kutner Buick, Inc. v. Strelecki*, 111 N.J. Super. 89, 267 A.2d 549 (1970); *State v. Cherry*, 387 S.W.2d 149 (Tex. Civ. App. 1965).

105. Further supporting this conclusion are two principles of statutory construction. Procedural requirements are generally considered to be directory. *State v. Musgrove*, 241 Md. 521, 217 A.2d 247 (1966); *Myers v. State*, 218 Md. 49, 145 A.2d 228 (1958), cert. denied, 359 U.S. 945; *Snyder v. Cearfoss*, 186 Md. 360, 46 A.2d 607 (1946). These guidelines are arguably procedural. In addition, statutes which are given a liberal construction are also generally construed to be directory. 2A A. SUTHERLAND, STATUTORY CONSTRUCTION § 58.01 (Sands ed. 1973). The Maryland courts have consistently construed the forfeiture statute liberally, consistent with its purpose and to avoid harsh results. *State v. One 1967 Ford Mustang*, 266 Md. 275, 292 A.2d 66 (1972); *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 284 A.2d 203 (1971); *Commercial Credit Corp. v. State*, 258 Md. 192, 265 A.2d 748 (1970). Accord, *Feitler v. United States*, 34 F.2d 30 (3d Cir. 1929), aff'd, 281 U.S. 389 (1930); *Jacob Oberson, Inc. v. Seyopp Corp.*, 251 App. Div. 170, 295 N.Y.S. 346 (1937); *Dye v. McCanless*, 185 Tenn. 18, 202 S.W.2d 657 (1947); *Hemenway & Moser Co. v. Funk*, 100 Utah 72, 106 P.2d 779 (1940). Contra, *Thomas v. State*, 241 Ala. 381, 2 So. 2d 772 (1941); *State v. One Ford Automobile*, 151 Ark. 29, 235 S.W. 378 (1921); *Brooks v. Wynn*, 209 Miss. 156, 46 So. 2d 97 (1950). Texas has a statute congenious to that of Maryland and has declared:

A consideration of the entire Act and the purposes sought to be achieved thereby will not permit us to hold that the legislature intended the provision in question to be mandatory, especially in the absence of words indicating a legislative intent to do more than provide for 'the proper, orderly and prompt conduct of business.'

*State v. Cherry*, 387 S.W.2d 149, 153 (Tex. Civ. App. 1965).

106. *United States v. Wunderlich*, 342 U.S. 98, 101 (1951) (dissenting opinion). See also A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 202-03 (10th ed. 1961); Kadish & Kadish, *On Justified Rule Departures by Officials*, 59 CALIF. L. REV. 905 (1971). However it is noted that the great expansion of the police power role today is necessitated by the problems of urbanization, industrialization and technology and therefore it is inevitable that substantial discretionary authority be delegated. *Id.* See also K. C. DAVIS, DISCRETIONARY JUSTICE, A PRELIMINARY INQUIRY 4 (1971).

be used "to pay off a score, to provide a basis for extortion or to [punish] an otherwise divergent or unpopular figure."<sup>107</sup> For example, a vehicle which the legislature intended not be seized according to the standards, might be seized despite them because the owner refused to furnish information which might lead to persons involved in narcotics trafficking. Similarly, the vehicle may be returned to an owner when he furnishes the requested information.

What is needed then is some form of immediate judicial review, preferably prior to seizure, to ensure compliance with the legislative purpose to limit seizure to vehicles owned by those who are significantly involved in drug trafficking. Some recent cases which indicate that such a prior hearing is required will be discussed in the next section.

#### IV. PROCEDURAL DUE PROCESS

The Supreme Court decision in *Fuentes v. Shevin*,<sup>108</sup> if applicable to the forfeiture concept, may offer further protection to innocent owners by requiring the state to give the owner an opportunity to be heard before his vehicle is seized. In *Fuentes*, state replevin statutes were held unconstitutional because they allowed state officials, on application of a private party, to seize the property of a debtor without affording the debtor a prior opportunity to be heard. The challenged statutes authorized a creditor to obtain a writ of replevin by filing a complaint alleging that he was entitled to the property and by posting a bond in an amount equal to at least double the value of the property to be replevied. The writ of replevin ordered the state official to whom it was directed to seize the property and to summons the defendant. The official was required to hold the seized property for a three-day period. During this period the debtor could reclaim it by posting his own bond. If the debtor did not do so, the property was transferred to the creditor pending a hearing on the merits of the creditor's claim.

The majority opinion emphasized that the purpose of the prior

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107. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTIONS* 290-91 (1968). The diversionary process by which offenders are channeled out of the criminal justice system (non-criminal dispositions) is analogous to the way in which discretion may be exercised to focus on certain violators. See Brakel, *Diversion from the Criminal Process: Informal Discretion, Motivation, and Formalization*, 48 DENVER L. J. 211 (1971).

If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most *dangerous* power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted . . . [L]aw enforcement becomes personal, and the real crime becomes that of being unpopular with predominant or governing groups, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

Jackson, *The Federal Prosecutor*, 31 J. CRIM. L.C. & P.S. 3, 5 (1940).

108. 407 U.S. 67 (1972). This case may be reconsidered by the Court in *Mitchell v. W.T. Grant Co.*, No. 72-6160 (U.S., filed Feb. 5, 1973).

hearing requirement is to protect against unfair or mistaken deprivations of property.<sup>109</sup> Consistent with this purpose, the Court insisted that notice and an opportunity for a hearing "must be granted at the time when the deprivation can still be prevented . . . . But no later hearing and no damage award can undo the fact that the arbitrary taking has already occurred."<sup>110</sup> Neither the fact that the taking was only temporary, nor that the debtor could immediately recover the property by posting his own bond were sufficient to justify the statute.<sup>111</sup> Further, the requirement that the debtor post a bond to obtain return of the property was itself said to be a taking.<sup>112</sup>

Although the Court held that a hearing was required prior to seizure of the property, it was careful to point out that its holding did not mean that property could not be taken prior to final judgment, but only that the creditor must establish the probable validity of his claim at a hearing prior to seizure.<sup>113</sup> Moreover, the Court stated that a pre-seizure hearing was not required in all cases—in a few extraordinary situations notice and opportunity for a hearing could be postponed.<sup>114</sup> Asserting that past Supreme Court decisions had allowed summary seizure in only a few limited circumstances, the Court found three factors common in such cases:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary in the particular instance.<sup>115</sup>

The Court gave the following examples of such extraordinary situations: "[T]hus the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food."<sup>116</sup>

*Fuentes* has had a major impact on multifarious statutes which authorize prejudgment seizure of property. For example, its rationale has been applied to prejudgment attachment statutes,<sup>117</sup> landlord's

109. 407 U.S. at 81.

110. *Id.* at 81-82.

111. *Id.* at 84-85.

112. *Id.* at 85.

113. *Id.* at 96.

114. *Id.* at 90-93.

115. *Id.* at 91.

116. *Id.* at 91-92.

117. See, e.g., *Richman v. Richman*, 72 Misc. 2d 803, 339 N.Y.S.2d 589 (1973); *Gunter v. Merchants Warren Nat'l. Bank*, 360 F. Supp 1085 (D. Me. 1973).

summary distress procedures,<sup>118</sup> innkeeper's liens<sup>119</sup> and garagemen's liens.<sup>120</sup> It has had an impact on other areas as well: parole revocation,<sup>121</sup> bankruptcy proceedings<sup>122</sup> and deprivation of public utilities.<sup>123</sup>

In basic outline Maryland's forfeiture statute is very similar to the state replevin statutes held unconstitutional in *Fuentes*. Property is seized by state officers without prior notice or opportunity for a hearing. After seizure the property is held by the state until a hearing can be had on the merits. If in the interim the owner wants possession of the property, he must post a bond in an amount equal to the value of the vehicle. There is one significant distinction—the seizure is not on behalf of a private party but rather for the state. This distinction should make no difference in the application of the *Fuentes* rationale because in the past the prior hearing requirement has been applied to seizures on behalf of the state.<sup>124</sup>

The constitutionality of the Maryland forfeiture statute will depend on its compliance with the three factors the *Fuentes* Court found common in prejudgment seizure statutes held constitutional. These factors are cumulative—each must be met to justify prehearing seizure.<sup>125</sup> The first of the requirements was that the seizure be “directly necessary to secure an important governmental or general public interest.”<sup>126</sup> Clearly, drug abuse is a serious problem in today's society, and control of drug trafficking is in the public interest. The need to control drug trafficking compares favorably with the need to protect the public from misbranded drugs and contaminated food, needs which the *Fuentes* Court found sufficient to justify prehearing seizure. It should be equally clear that depriving drug traffickers of the means by which they operate is a proper concern of law enforcement officials in reaching the goal of controlling drug distribution.

But what is not so clear is whether prehearing seizure is necessary to accomplish this goal. Phrased in terms of the second part of the *Fuentes* test, the problem is whether “a special need for very prompt action” exists. With regard to automobiles there is lacking the same inherent

118. See, e.g., *Shaffer v. Holbrook*, 346 F. Supp. 762 (S.D.W. Va. 1972); *Gross v. Fox*, 349 F. Supp. 1164 (E.D. Pa. 1972).

119. See, e.g., *Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973).

120. See, e.g., *Mason v. Garriss*, 360 F. Supp. 420 (N.D. Ga. 1973); *Straley v. Gassaway Motor Co.*, 359 F. Supp. 902 (S.D.W. Va. 1973); *Quebec v. Bud's Auto Service*, 105 Cal. Rptr. 677 (Super. Ct. App. Dept. 1973).

121. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Stewart v. Jozwiak*, 346 F. Supp. 1062 (E.D. Wis. 1972).

122. *Sandnes' Sons, Inc. v. United States*, 462 F.2d 1388 (Ct. Cl. 1972).

123. See, e.g., *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 314 (6th Cir. 1973); *Pugh v. Rainwater*, 355 F. Supp. 1286 (S.D. Fla. 1973), *aff'd*, 483 F.2d 778 (5th Cir. 1973); *Bronson v. Consolidated Edison Co. of New York, Inc.*, 350 F. Supp. 443 (S.D.N.Y. 1972).

124. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Bell v. Burson*, 402 U.S. 535 (1971).

125. *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972); *Roscoe v. Butler*, 367 F. Supp. 574, 579 (D. Md. 1973).

126. 407 U.S. 67, 91 (1972).

dangers that may be found with respect to misbranded drugs and contaminated foods. Unlike those items, automobiles are not in themselves intrinsically harmful. Yet in some circumstances a need for prompt action would exist.<sup>127</sup> Notice to a criminal that his vehicle may be seized after a hearing may defeat the purpose of the statute. Presumably some owners would conceal the vehicle, remove it from the state, sell it or otherwise dispose of it rather than risk its forfeiture. But not all owners are likely to do so. For example, the owner in the *Opel* case was the father of the person accused of the crime.<sup>128</sup> Other Maryland cases have involved the lessor of a cab<sup>129</sup> and a secured party.<sup>130</sup> At least in these situations no need for prompt action exists unless in a particular situation state officials have reason to believe that the owner will conceal or dispose of the vehicle. But the statute is not narrowly drawn to limit its application to these special situations.

The third test enunciated in *Fuentes* requires that the state maintain "strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that [seizure] was necessary in the particular instance."<sup>131</sup> The Maryland forfeiture statute does require a state official to determine the need for seizure. Further, the statute contains guidelines governing when seizure should be made. In that sense it is narrowly drawn. However, the statute does not require the official authorizing seizure to determine the need for *prehearing* seizure,<sup>132</sup> but only whether some general need for seizure exists. Nor do the guidelines govern when *prehearing* seizure should occur. Thus, although the Maryland statute meets the first of the three *Fuentes* tests, it does not meet the last two—it is not narrowly drawn to limit its use to extraordinary situations when summary seizure is necessary, and no state official determines the need for summary seizure. The conclusion follows that it is unconstitutional.

Only two reported decisions have considered the application of *Fuentes* to automobile forfeiture statutes. In *Fell v. Armour*,<sup>133</sup> a three-judge federal district court rejected the contention that the statute was unconstitutional because it failed to provide an opportunity for a pre-seizure hearing. Relying on the "historically peculiar nature of the law relevant to forfeitures,"<sup>134</sup> the court felt that automobile

127. In some cases the owner would rather have his car impounded than left on the street where vandalism, theft, or traffic hazards could result. If a car is impounded, however, the owner could obtain return of his car upon demand since this is not the type of seizure contemplated by the forfeiture statutes. *Plitko v. State*, 11 Md. App. 35, 272 A.2d 669 (1971); see Annot., 48 A.L.R.3d 537 (1973).

128. *Prince George's County v. One (1) 1969 Opel*, 267 Md. 491, 298 A.2d 168 (1973).

129. *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 284 A.2d 203 (1971).

130. *Lumar Sales, Inc. v. State*, 268 Md. 355, 301 A.2d 495 (1973).

131. *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972).

132. The purpose of the required review by a state official is to determine the need for summary seizure. *Id.* at 93; *Roscoe v. Butler*, 367 F. Supp. 574, 579 (D. Md. 1973).

133. 355 F. Supp. 1319 (M.D. Tenn. 1972).

134. *Id.* at 1326.

seizure pursuant to forfeiture statutes was an extraordinary situation justifying prehearing seizure. The court did not clearly explicate its reasoning for this finding but appeared to be relying on the numerous prior cases holding that forfeiture statutes were not subject to traditional due process requirements. The court said:

The Act, as interpreted by the Court, provides for forfeiture upon use of property in violation of the Act. Upon the illegal use the state is entitled to immediate possession of the property and property rights of the owner are immediately divested, though the seizure and physical deprivation may not occur until later. The courts have consistently recognized that statutes may provide for immediate forfeiture upon the illegal use of property.<sup>135</sup>

Despite denying the prior hearing claim, the court held the statute unconstitutional on three other procedural due process grounds: it did not require the state to notify an owner that the vehicle had been seized, it placed no burden on the state to prove that the seized vehicle was used in violation of the statute, and it deprived indigent owners of their right to be heard by imposing a \$250 cost bond as a condition precedent to the forfeiture hearing.<sup>136</sup> The dissenting opinion,<sup>137</sup> although concurring in the result as to the other due process grounds, disagreed with the view taken by the majority as to the applicability of *Fuentes*. After noting that the basis of the majority's holding was the traditional forfeiture doctrine that the chattel had committed the wrong, the dissenter analyzed recent cases to show that this fiction "is no longer intact and that, therefore, the Court is not precluded from applying the due process clause to forfeiture hearings . . ."<sup>138</sup>

In the other case a contrary opinion was expressed. In *Pearson Yacht Leasing Co. v. Massa*,<sup>139</sup> the challenged forfeiture statute was held unconstitutional by a three-judge district court because it allowed taking of property from an innocent person for government use without compensation. This holding was, of course, contrary to the earlier precedent, but the court believed it followed from recent decisions, which it interpreted as abandoning the legal fiction that an inanimate

135. *Id.*

136. *Id.* at 1335. The proposition that a hearing must be afforded immediately after the seizure was considered in *People v. Campbell*, 39 Mich. App. 433, 198 N.W.2d 7 (1972), where an owner complained that the failure to give him timely notice and a hearing immediately upon seizure contravened procedural due process. The court agreed that the statute could not be upheld, even though notice and a hearing were actually provided, because the statute could not be interpreted as requiring such notice on its face. *See also Menkareli v. Bureau of Narcotics*, 463 F.2d 88 (3d Cir. 1972) (where name and address of owner are known, he should at least be given a copy of the proposed forfeiture), *Jaekel v. United States*, 304 F. Supp. 993, 999 (S.D.N.Y. 1969) (oral notice of seizure and advice to contact attorney did not give plaintiff sufficient notice of the forfeiture proceeding).

137. *Fell v. Armour*, 355 F. Supp. 1319, 1340 (M.D. Tenn. 1972).

138. *Id.* at 1343.

139. 363 F. Supp. 1337, (D.P.R. 1973), *appeal granted sub nom.* *Calero-Toledo v. Pearson Yacht Leasing Co.*, Doc. No. 73-157 (U.S., filed July 21, 1973).

object could be guilty of wrongdoing.<sup>140</sup> However, the court did not stop there. It further held the statute was unconstitutional because it did not provide for notice and opportunity for a hearing prior to seizure. Forfeiture was found not to be an extraordinary situation justifying postponing a hearing. The court said:

[T]he only argument advanced in defense of the prehearing seizure is the "need" for efficient control of narcotics. However, we have not been shown in what way prehearing confiscations are going to aid or make more efficient the enforcement of criminal laws. It must be pointed out that the seizure of the yacht took place on July 11, 1972, while the act for which it was forfeited took place on May 6, 1972. Under such circumstances, there is no justification for not including in the statute a provision that would require a hearing prior to seizure . . . . [E]fficiency and economy do not justify obliterating procedural due process . . . .<sup>141</sup>

The *Pearson Yacht* case is now before the Supreme Court for review.<sup>142</sup> The Court may avoid the question of the application of the *Fuentes* doctrine to forfeitures by affirming the lower court's holding that the Constitution requires the government to provide protection to innocent owners.<sup>143</sup> If the Court reaches the procedural due process question, another line of cases may have an important bearing on the outcome. In a recent case the Court has indicated an inclination to abandon the concept that an inanimate object is capable of wrongdoing, and, consequently, the result that an owner has no substantive due process rights to be asserted. The case is *United States v. United States Coin & Currency*,<sup>144</sup> in which the Supreme Court questioned, but did not decide the constitutionality of seizure of an innocent person's property for the wrong of another. In that case the government contended that an innocent owner was not protected by the statute. The Court noted that the history of forfeiture laws supported the government's contention; however, it questioned whether forfeiture statutes which did not protect innocent owners were consistent with the due process clause. The Court commented:

Even Blackstone, who is not known as a biting critic of the

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140. *Id.* at 1341.

141. *Id.* at 1343.

142. *Pearson Yacht Leasing Co. v. Massa*, 363 F. Supp. 1337 (D.P.R. 1973), *appeal granted sub nom.* Calero-Toledo v. Pearson Yacht Leasing Co., Doc. No. 73-157 (U.S., filed July 21, 1973).

143. *Id.* at 1342. The Court could conceivably avoid considerations of the constitutional claims adjudicated below by relying on certain preliminary grounds urged on appeal: that the lower court's declaration of the statutes' unconstitutionality was premature pending an interpretation of the statute by the courts of Puerto Rico; or that any loss of appellee's property was a result of failure to test possible remedies under Puerto Rican law which might have been or might still be available.

144. 401 U.S. 715 (1971).

English legal tradition, condemned the seizure of the property of the innocent as based upon a "superstition" inherited from the "blind days" of feudalism. And this Court in the past has recognized the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment.<sup>145</sup>

The Court's comment was clearly dicta. Nevertheless, the case has been cited as ending the fiction that inanimate objects are capable of wrongdoing.<sup>146</sup> Although the case holds no such thing, when read with other recent cases,<sup>147</sup> it does indicate a trend in that direction. This trend supports the application of the *Fuentes* rationale to forfeitures. For if the Court is willing to abandon the fiction that an inanimate object is capable of wrongdoing, it follows that the forfeiture proceeding is really against the owner and that the owner is more clearly entitled to the protection afforded by a prior hearing.<sup>148</sup>

It should be noted that even if the Supreme Court affirms the holding in *Pearson Yacht* that the statute violates substantive due process because it fails to protect innocent owners, the decision is unlikely to affect the Maryland statute. In contrast to the Puerto Rican statute, the Maryland statute does protect innocent owners by affording them an opportunity to show that they were not involved in drug trafficking. Since innocent owners are protected, the due process clause would appear to be satisfied substantively.

## V. CONCLUSION

Modern forfeiture statutes have evolved from the ancient concept of deodand. Today the basic fictions of that concept continue—the res, not the owner, is the offender and the action is civil rather than

145. *Id.* at 720-21.

146. *Pearson Yacht Leasing Co. v. Massa*, 363 F. Supp. 1337, 1341 (D.P.R. 1973), *appeal granted sub nom.* Calero-Toledo v. *Pearson Yacht Leasing Co.*, Doc. No. 73-157 (U.S., filed July 21, 1973).

147. *McKeehan v. United States*, 438 F.2d 739, 745 (6th Cir. 1971): "[T]he imposition of forfeiture on the Appellant is penal and causes an unconstitutional deprivation of property 'without just compensation.'" In *DiGiacomo v. United States*, 346 F. Supp. 1009, 1011 (D. Del. 1972) (citations omitted), the court observed:

Forfeitures, although said to be in the public policy, are a harsh and violent procedure, at least until now sanctioning the seizure and sale of property without any notice of, or the right to, a prior hearing. . . . Nevertheless, in my opinion, this exceptional procedure is beginning to run a collision course with a number of recent Supreme Court cases and hopefully in the near future will be fully reexamined by that court. . . .

See also *United States v. One Bally Sun Valley Pinball Machine*, 340 F. Supp. 307 (W.D. La. 1972); *United States v. One Lot of 18 Firearms*, 325 F. Supp. 1326, 1329-30 (D.N.H. 1971): "Requiring forfeiture . . . would not only be unjust, but would also raise serious questions of due process."

148. See *Fell v. Armour*, 355 F. Supp. 1319, 1341-43 (M.D. Tenn. 1972) (dissenting opinion).



criminal in nature. But there is a trend toward abandonment of these fictions. The harsh results possible under the forfeiture laws have caused legislatures to make exception from forfeiture for innocent owners. For example, the Maryland legislature has abandoned the fiction in part by creating exceptions to seizure and forfeiture that, consistent with the purpose of such laws, protect owners who are not significantly involved in a criminal enterprise. Each new exception whittles away at the fictions.

This trend away from the fictions has been furthered by recent decisions which have questioned their continued vitality, or in some cases forsaken them altogether. The probable application of the *Fuentes* rationale to the forfeiture concept would create another significant inconsistency with the historical origins of forfeiture.

It may be that the time has come to abandon the fiction altogether. If the legislature believes that forfeiture of automobiles does limit drug trafficking, and, therefore, that the concept should be continued, it would seem more compatible with reality to recognize that forfeiture is punitive in nature. If the forfeiture proceeding is recognized as being criminal, then the state would have the burden of proving beyond a reasonable doubt that the owner used the automobile in the commission of a crime. Thus, acquittal of the owner in the criminal proceeding should operate as a dismissal of the forfeiture proceeding since both proceedings are based on the same operative facts.<sup>149</sup>

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149. See *United States v. One (1) 1969 Buick Riviera Automobile*, 358 F. Supp. 358, 359 (S.D. Fla. 1973).